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No. 37047

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1981

**JACK P. MICKLE AS MAYOR OF THE CITY OF COLUMBUS, A. J. McCLUNG AS MAYOR PRO TEM OF THE CITY OF COLUMBUS, HENRY N. BARBIAN, JACK B. BASSETT, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, AND ROBERT L. WRIGHT AS COUNCILMEN OF THE CITY OF COLUMBUS, AND THE CITY COUNCIL OF COLUMBUS, GEORGIA,**

*Petitioners,*

***versus***

**CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER,**

*Respondent,*

## RESPONSIVE BRIEF OF CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER TO APPLICANTS' PETITION FOR CERTIORARI

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# No. 37047

IN THE

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**JACK P. MICKLE AS MAYOR OF THE CITY OF COLUMBUS, A. J. McCLUNG AS MAYOR PRO TEM OF THE CITY OF COLUMBUS, HENRY N. BARBIAN, JACK B. BASSETT, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, AND ROBERT L. WRIGHT AS COUNCILMEN OF THE CITY OF COLUMBUS, AND THE CITY COUNCIL OF COLUMBUS, GEORGIA,**

*Petitioners,*

***versus***

**CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER,**

*Respondent,*

Responsive Brief of Cross Country Corporation d/b/a/ Cross Country Plaza Shopping Center to Applicants' Petition For Certiorari

## STATEMENT OF THE CASE

Respondent is the owner of a one-acre tract of land located in the city of Columbus, Georgia, adjacent to a developed shopping center also owned by respondent. The one-acre tract is zoned for residential purposes only and this action commenced after the denial of an application for rezoning filed by respondent seeking commercial zoning to permit uses consistent with the adjacent shopping center. Respondent's original action was filed in the Superior Court of Muscogee County, Georgia (Appendix A).

Applicant filed a response to the Complaint and thereafter and on the 10th day of March, 1978 filed a Request For Trial By Jury (Appendix B). After discovery was completed and on the 1st day of December, 1978 applicant filed a Motion For Summary Judgment (Appendix C) contending that "there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law." Thereafter, and on January 5, 1979, respondent filed its Motion For Summary Judgment (Appendix D). After a full hearing the Superior Court of Muscogee County entered an Order granting respondent's Motion For Summary Judgment (Appendix E) and providing in part as follows:

> It is further ordered that, within a reasonable time from the date of this Order (not more than sixty days), the City Council of Columbus shall provide constitutional zoning for the property which is the subject matter of this litigation, and this Court retains jurisdiction over this matter until such action has been finally accomplished. Upon failure of the Council to so act, this Court reserves jurisdiction to declare the property which is the subject matter of this litigation free and clear of zoning restrictions. (See *Guhl v. Holcomb Bridge Road*, 238 Ga. 323; *Guhl v. Tuggle*, 242 Ga. 412.)

Applicant appealed the decision of the trial court to the Supreme Court of Georgia and that Court affirmed the trial court, by decision dated January 8, 1980, without opinion (Appendix F).

After remand to the Superior Court of Muscogee County, the City Council of Columbus (applicants) proceeded to zone the property commercial with numerous

restrictions including a restriction that the property could be used only for parking for a period of twenty years. Respondents promptly filed a Motion in the Superior Court, said Motion being incorporated in Applicants' Petition for Certiorari (pages 28a-34a), and after receiving additional evidence and a hearing, the trial court by Order of April 9, 1980 (Appendix G) remanded the case to the Council with the direction that:

> . . . within 60 days from the date of this Order Council provide constitutional zoning for the subject property and upon failure of which and upon motion by the Plaintiff this Court will declare the subject property free of zoning and enjoin any further attempt on the part of the Council of the City of Columbus from attempting to restrict by zoning the use of the property by its owner.

Applicants again appealed to the Supreme Court of Georgia and on April 8, 1981 the Supreme Court of Georgia again affirmed the decision of the trial court of Muscogee County without opinion (Appendix H).

*No Order has ever been entered on applicants' Request For Trial By Jury.*

## APPLICANTS ARE NOT ENTITLED TO REVIEW BY CERTIORARI

Applicants obtained no ruling from the trial court on their Request For Trial By Jury, presumably because applicants, in a subsequent Motion For Summary Judgment, took the position that there were no genuine issues of fact and the case should be decided as a matter of law. Therefore, the case presents no issue for this Court to determine as to the constitutional right to a jury trial even if applicants' position were correct, which, as a matter of law, it is not.

Applicants' Petition for Certiorari is either (1) an effort to "appeal" from the decision of the Supreme Court of Georgia (such an appeal will not lie), or (2) a contention that summary judgment procedure itself is unconstitutional, an issue which has long since been laid to rest. *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 88 L.Ed. 967, 64 S.Ct. 724 (1944); *Diamond Door Company v. Lane-Stanton Lumber Company*, 505 F.2d 1199 (1974); *Oglesby v. Terminal Transport Company, Inc.*, 543 F.2d 1111 (1976); *Barrett v. Independent Order of Foresters*, 625 F.2d 73 (1980).

## CONCLUSION

Applicants' Petition for Certiorari should be denied because of the total absence of a Supreme Court Rule 17(c) showing.

Respectfully submitted,

FRANK LOVE, JR.
*Attorney for Respondent*

POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C&S National Bank Building
35 Broad Street, N.W.
Atlanta, Georgia 30335
(404) 572-6600

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Responsive Brief of Cross Country Corporation d/b/a Cross Country Plaza Shopping Center to Applicants' Petition For Certiorari on Mr. E. H. Polleys, Jr., Associate City Attorney, Post Office Box 1340, Columbus, Georgia, 31993, Attorney for Petitioners, by placing said copy in the United States mail, postage prepaid.

This 7th day of August, 1981.

FRANK LOVE, JR.
*Attorney for Respondent*

# APPENDIX A

IN THE

SUPERIOR COURT OF
MUSCOGEE COUNTY

STATE OF GEORGIA

CROSS COUNTRY CORPORATION
d/b/a/ Cross Country Plaza Shopping Center,

*Plaintiff,*

vs.

JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK E. LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

*Defendants.*

CIVIL ACTION
FILE NO. 70525

## COMPLAINT

Comes now CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER (hereinafter referred to as "Cross Country"), and files this its Complaint for Declaratory and Equitable Relief against JACK P. MICKLE, A. J. McCLUNG, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK E. LAND, ALAN G. NICAS, LEWIS POWELL and ROBERT L. WRIGHT, as members of the City Council of Columbus, Georgia, (hereinafter collectively referred to as "the Councilmen"), and the City Council of Columbus, (the Councilmen and the City Council of Columbus, Georgia, being hereinafter collectively referred to as "the Council"), respectfully showing the Court the following facts:

1.

The above-named defendants compose the governing authority of Columbus, Georgia, are residents of this County, and are subject to the jurisdiction of this Court.

2.

That plaintiff is the owner of a certain vacant lot at 3000 Birchfield Drive, lying on the south side of Birchfield Drive at its intersection with the Cross Country Plaza Shopping Center, and being more particularly described as follows:

> All that lot or parcel of land lying in Land Lot 95, Coweta Reserve, Columbus, Muscogee County, Georgia and being more particularly described as follows:
>
> Beginning at an iron marker on the southern boundary of the right-of-way of Birchfield Drive at its point of intersection with the eastern property line of Lot B, Block "KK" of the 3rd Addition to Hilton Heights Subdivision as

shown on a plat of said 3rd Addition to Hilton Heights Subdivision in Plat Book 16 at folio 73-B in the office of the Clerk of the Superior Court, Muscogee County, Georgia, thence running along a line 74 degrees north 35 minutes east 216.4 feet to an iron pin, thence running along a line 74 degrees north 35 minutes east 20.05 feet to an iron pin, thence running along a line south 2 degrees 25 minutes west 229.28 feet to an iron pin, thence running along a line south 88 degrees 35 minutes west 211.9 feet to a concrete monument, thence running along a line north 2 degrees 13 minutes west 171.66 feet to the point of beginning.

3.

That on or about June 7, 1976, Cross Country, through its attorneys, made application for rezoning of the above-described real property from its present zoning classification of R-1A (Low Density Residential) to C-2 (Neighborhood Commercial) zoning classification to enhance the utilization of presently undeveloped private lands lying within Columbus, Georgia, by providing needed parking spaces for employees and owners of the shops, stores, businesses, theatres, and offices in the Cross Country Plaza Shopping Center area and for customers of those diverse businesses.

4.

That the Planning Advisory Commission considered this request at their meeting of June 23, 1976, and recommended that the rezoning be approved.

5.

That subsequently, the request for rezoning was submitted to the Planning Division of the

Department of Community Development which, after investigation and careful consideration of said request, recommended to the Council of Columbus, Georgia, that said request be approved and that the Zoning Atlas of the Planning Division of the Department of Community Development be amended as requested.

6.

That the Council of Columbus, Georgia, held a public hearing on Tuesday, August 10, 1976, beginning at 9:00 a.m. in the Council Chambers of the Columbus Consolidated Government Center, for the purpose of hearing interested parties relative to the requested change in the zoning ordinance.

7.

That at its regular weekly meeting held August 17, 1976, the Council arbitrarily, unreasonably, capriciously, and in abuse of its discretion, rejected the requested zoning change. That at its regular meeting, of August 24, 1976, the Council, upon second reading of the proposed zoning change, again arbitrarily, capriciously, and without reason, and in abuse of its descretion, voted to reject the requested zoning change.

8.

That although the property is zoned residential, it has never been used for residential purposes, and in fact, cannot economically and practically be used for the purposes permitted by the existing zoning thereon.

9.

That the zoning ordinance of Columbus, Georgia, which placed the Cross Country property in the R-1A zoning classification is, as applied to the Cross Country

property, arbitrary, unreasonable, and confiscatory, in its application to the Cross Country property, is unconstitutional, null and void, in that it prohibits the use of the Cross Country property for the only use for which the property is reasonably and economically suited, to-wit: commercial use, and has the effect of freezing the Cross Country property in its present undeveloped condition; thus, the application of the present zoning restrictions to the Cross Country property is the equivalent of an unlawful confiscation of the plaintiff's valuable property rights in the Cross Country property without the prior payment of just compensation therefor, since the Cross Country property is unsuitable for the purposes classified, in violation of Art. 1, Sec. 1, Par. 3 of the Georgia Constitution (*Code Ann.* §2-103), Art. 1, Sec. 3, Par. 1 of the Georgia Constitution (*Code Ann.* §2-301), and the due process clause of the Fourteenth Amendment to the Constitution of the United States (*Code Ann.* §1-815) and results in relatively little gain or benefit to the public while inflicting serious injury and loss on the owners of the property.

10.

The rejection of the application for rezoning of the Cross Country property by the Council was arbitrary, unreasonable, and confiscatory in nature in that it deprives the owners of the beneficial use of their property without due process of law and bears no relation to the public health, safety, morals or welfare and amounts to an abuse of the Council's discretion.

WHEREFORE, the plaintiff prays:

(a) that process issue requiring defendants to answer this complaint as provided by law;

(b) that the zoning ordinance of Columbus, Georgia be declared null and void in its application to the Cross Country property;

(c) that the decision to reject the proposed rezoning change by the defendant Council be declared null and void and violative of the constitutional rights of the plaintiff;

(d) that the court adjudge and decree that the only use for the aforedescribed property be commercial use;

(e) that the defendant council be ordered to give immediate consideration to said property and reclassify it under a zoning classification which would not violate the constitutional rights of the property owner and deprive it of its reasonable use as soon as practicable or on a day certain; and

(f) that plaintiff receive such other and further relief as the Court may deem just and proper in the circumstances of this case.

POWELL, GOLDSTEIN, FRAZER & MURPHY

/s/
*Frank Love, Jr.*

/s/
*J. Robert Carr*

1100 C&S National Bank Building
Atlanta, Georgia 30303
521-1900

MARTIN, KILPATRICK & DAVIDSON, P.C.

/s/
*Paul Kilpatrick, Jr.*

828 Broadway
Columbus, Georgia 31902
324-7371

## VERIFICATION

STATE OF GEORGIA
COUNTY OF FULTON

Personally before me, the undersigned attesting officer, duly authorized to administer oaths, came LAWRENCE I. THORPE, who after being first duly sworn on oath, states that he is President of Cross Country Corporation, and is authorized by said Company to sign this Verification and that the facts set forth in the attached Complaint are true and correct to the best of his knowledge and belief.

This 12 day of November, 1976.

/s/ Lawrence I. Thorpe

Sworn to and subscribed
before me this 12 day of
November, 1976.

/s/ Anna H. Douglas
Notary Public

My Commission Expires:
October 26, 1980

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION
d/b/a/ Cross Country Plaza Shopping Center,

*Plaintiff,*

vs.

JACK P. MICKLE, as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK E. LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

*Defendants.*

CIVIL ACTION
FILE NO. 70525

## REQUEST FOR TRIAL BY JURY

I

Defendants in the above styled action request that the Court grant to them a trial by jury to determine questions of fact that will arise before any final determination can be made in response to the plaintiff's Prayers for Relief.

II

The action is in essence a declaratory judgment action and the law of Georgia provides for either general or special verdicts in such actions.

III

Although the equitable features of the action are only incidental to the declaratory relief sought, the statutory law of Georgia provides for jury trials in equity where matters of fact must be ascertained and such jury verdicts normally are in the form of special verdicts, but the defendants would in the present case suggest that a general verdict is appropriate because of the nature of the legal question.

IV

Defendants suggest that the following questions could be submitted to the jury and that such questions involve matters of fact which the Court needs to have determined before it can mold any final decree, regardless of whether it is considered declaratory or equitable in nature:

(a) Would the proposed rezoning of the subject property have any detrimental effect on the

residential use of adjoining property or property directly across the street from the subject property or property within view of the subject property or the adjoining residential neighborhood in general?

(b) Does the present zoning regulation result in at least a little gain or benefit to the public?

(c) Does the present zoning classification of the subject property inflict serious loss or injury on the owner?

(d) Has plaintiff exercized due diligence or been timely in attempting to have the subject property rezoned from its present residential classification to its proposed commercial classification?

(e) Did various residential property owners in the neighborhood purchase or improve their lots or homes in reliance upon the present zoning classification?

(f) Have plaintiff's own actions contributed to any of the problems which are alleged to exist because of the present zoning of the subject property?

V

The Seventh Amendment to the Constitution of the United States provides for a trial by jury in civil cases in suits at common law of which the value in controversy shall exceed $20.00 and Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall deprive any person of life, liberty, or property without due process of law, nor shall any state enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny any person within its jurisdiction the equal protection of the laws. Irrespective of any provisions of the Constitution of the State of Georgia, the Seventh and

Fourteenth Amendments to the Constitution of the United States guaranty to the defendants in the present case the right to a trial by jury and defendants demand the same.

/s/
*E. H. Polleys, Jr.*
Associate City Attorney
P.O. Box 1340
Columbus, Georgia 31902

## CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Request for Trial by Jury on Frank Love, Jr. and J. Robert Carr, of the law firm of Powell, Goldstein, Frazer & Murphy, 1100 C&S National Bank Building, Atlanta, Georgia 30303, and on Paul Kilpatrick, Jr., of the law firm of Martin, Kilpatrick & Davidson, P.C., 828 Broadway, Columbus, Georgia 31902, by placing same in the United States mail, postage prepaid.

This 10 day of March, 1978.

/s/
*E. H. Polleys, Jr.*

## APPENDIX C

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY
CORPORATION
d/b/a/ Cross Country Plaza
Shopping Center,

*Plaintiff,*

vs.

JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

*Defendants.*

CIVIL ACTION
FILE NO. 70525

## MOTION FOR A SUMMARY JUDGMENT

Defendants move that the Court grant a Summary Judgment in their favor on the grounds that the pleadings and depositions and answers to interrogatories on file show that there is no genuine issue as to any material fact and that Defendants are entitled to a judgment as a matter of law. The Court is requested to grant a Certificate of Immediate Review in the event that the motion is denied.

/s/

E. H. POLLEYS, JR.
Associate City Attorney
P.O. Box 1340
Columbus, Georgia 31902

## NOTICE OF MOTION

To: Frank Love, Jr., 1100 C&S National Bank Building, Atlanta, Georgia, 30303 and Paul Kilpatrick, Jr., 828 Broadway, Columbus, Georgia, 31902; Attorneys for Plaintiff

Please take notice that the Defendants will bring this Motion for a Summary Judgment on for a hearing before the Honorable Oscar D. Smith, Jr., at 11:00 o'clock a.m. on the 5th day of January, 1979.

/s/

*E. H. Polleys, Jr.*

## CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing motion on opposing counsel by placing a copy in the United States mail, postage prepaid.

This 1 day of December, 1978.

/s/

*E. H. Polleys, Jr.*

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

| | |
|---|---|
| CROSS COUNTRY CORPORATION d/b/a/ Cross Country Plaza Shopping Center,<br>*Plaintiff,*<br>vs.<br>JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,<br>*Defendants.* | CIVIL ACTION<br><br>FILE NO. 70525 |

## MOTION FOR SUMMARY JUDGMENT

Now comes plaintiff, CROSS COUNTRY CORPORATION, and moves the Court pursuant to Section 56B of the Georgia Civil Practice Act for summary judgment in favor of plaintiff on claims presented in plaintiff's complaint on the grounds that there is no genuine issue as to any material facts and plaintiff is entitled to judgment as a matter of law. This motion is based upon

(1) plaintiff's complaint and the answer thereto;

(2) the depositions on file in this case;

(3) the Affidavit of Lawrence I. Thorpe;

(4) the Affidavit of James Pierce; and

(5) any and all other pleadings and documents which are a part of the record in this case which may be deemed relevant by the Court.

This 5th day of January, 1979.

/s/
*Frank Love, Jr.*

POWELL, GOLDSTEIN, FRAZER & MURPHY
1100 C&S National Bank Building
Atlanta, Georgia 30303
(404) 572-6600

/s/
*Paul Kilpatrick, Jr.*

MARTIN, KILPATRICK & DAVIDSON, P.C.
P.O. Box 2828
Columbus, Georgia 31902
(404) 324-7371

Attorneys for the Plaintiff

## CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 5th day of January, 1979

/s/
*Paul Kilpatrick, Jr.*

## APPENDIX E

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

CROSS COUNTRY CORPORATION
d/b/a/ Cross Country Plaza Shopping Center,

*Plaintiff,*

vs.

JACK P. MICKLE as Mayor of the City of Columbus, A. J. McCLUNG as Mayor Protem of the City of Columbus, HENRY N. BARBIAN, JACK B. BASSET, PHILIP BATASTINI, TOMMY GREENHAW, MILTON HIRSCH, JACK LAND, ALAN G. NICAS, LEWIS POWELL, and ROBERT L. WRIGHT as Councilmen of the City of Columbus, and THE CITY COUNCIL OF COLUMBUS, GEORGIA,

*Defendants.*

CIVIL ACTION
FILE NO. 70525

## ORDER

Plaintiff and defendant having each filed their separate motions for summary judgment and the above case having come on regularly before the undersigned for presentation of evidence and agrument on February 5, 1979, and the Court having considered the relevant portions of all affidavits submitted by both plaintiff and defendants, the various documents introduced, relevant portions of the depositions on file, the verified complaint and relevant portions of answers to interrogatories, and after extensive argument and citation of authority by counsel for plaintiff and defendants, the Court finds as follows:

Plaintiff was substantially damaged by the refusal of the City Council of Columbus to rezone plaintiff's property from R-1A to C-2 in accordance with plaintiff's application for rezoning. Plaintiff was not only effectively deprived of the use of their property, but have likewise suffered substantial monetary damage because of the unsuitability of the subject property for residential development and the substantial difference in value of the property zoned as R-1A and the property zoned C-2. The Court also finds that the zoning classification maintained and enforced by the City Council of Columbus bore no substantial relation to the public health, safety, morality or general welfare of the community. Lacking such justification, the Court finds and declares that the action of the City Council of Columbus was arbitrary and unreasonable and in violation of Article 1, Sec. 1, Par. 3 of the Georgia Constitution (Code Ann. §2-103), Article 1, Sec. 3, Par. 1 of the Georgia Constitution (Code Ann. §2-301), and the due process clause of the Fourteenth Amendment to the Constitution of the United States (Code Ann. §1-815). (See *Barrett v. Hamby*, 235 Ga. 262.) Plaintiff's motion is therefore granted and judgment entered for the plaintiff as herein stated.

It is further ordered that, within a reasonable time from the date of this Order (not more than sixty days), the City Council of Columbus shall provide constitutional zoning for the property which is the subject matter of this litigation, and this Court retains jurisdiction over this matter until such action has been finally accomplished. Upon failure of the Council to so act, this Court reserves jurisdiction to declare the property which is the subject matter of this litigation free and clear of zoning restrictions. (See *Guhl v. Holcomb Bridge Road*, 238 Ga. 323; *Guhl v. Tuggle*, 242 Ga. 412.)

It is further order that, in the event of an appeal by defendants, the filing of a notice of appeal shall act as a supersedeas and the reasonable time (not more than sixty days) hereinabove provided for in this Order for the Council to provide constitutional zoning for the subject property shall not begin to run unless and until this judegment is affirmed by the proper appellate court and the judgment of such court is filed in this Court revesting jurisdiction in this Court.

This 12th day of February, 1979.

/s/ Oscar D. Smith, Jr.

*Judge, Superior Court of Muscogee County*

In the Supreme Court of Georgia.

Decided: January 8, 1980

35315. MICKLE, MAYOR et al. v. CROSS COUNTRY CORPORATION

*Judgment affirmed without opinion pursuant to Rule 59.*

*All the Justices concur.*

## APPENDIX G

IN THE
SUPERIOR COURT OF
MUSCOGEE COUNTY
STATE OF GEORGIA

| | |
|---|---|
| CROSS COUNTRY CORPORATION<br>d/b/a/ Cross Country Plaza Shopping Center,<br>*Plaintiff,*<br><br>vs.<br><br>JACK P. MICKLE, et al.,<br>*Defendent.* | CIVIL ACTION<br>FILE NO. 79525<br><br>**MOTION** |

### ORDER

Plaintiff having moved the Court to declare the property which is the subject matter of this litigation free of zoning or, in the alternative, to remand the case to the Council of the City of Columbus, with the direction that they grant constitutional zoning and said Motion having come on regularly for hearing and the Court having considered evidence submitted on behalf of the Plaintiff and Defendant's argument of counsel and citation of authority, finds as follows:

The action of the City Council by Ordinance of March 19, 1980 purporting to rezone the subject property C-2 but attaching the following restrictions and conditions:

1. The parcel to be used exclusively for parking for a period of at least 20 years.

2. Cross Country Plaza Shopping Center to erect a 55 inch brick wall along Birchfield Drive and along the westerly line of this parcel.

3. Cross Country Plaza Shopping Center to construct a sidewalk along Birchfield Drive.

4. Cross Country Plaza Shopping Center to maintain appropriate landscaping outside the brick wall.

was arbitrary, capricious, discriminatory, unreasonable and without regard or consideration of the interests of the owner of the property and bears no relation to a concern for the health, welfare and safety of the community. This Court, following the directive of the Supreme Court of Georgia in the case of *DeKalb Co. v. Flynn*, 243 *Ga.* 679, remands the matter to the Council of the City of Columbus with the direction that, within 60 days from the date of this Order Council provide constitutional zoning for the subject property and upon failure of which and upon motion by the Plaintiff this Court will declare the subject property free of zoning and enjoin any further attempt on the part of the Council of the City of Columbus from attempting to restrict by zoning the use of the property by its owner.

SO ORDERED this 9th day of April, 1980.

/s/ Oscar D. Smith, Jr.
*Judge, Superior Court of Muscogee County*

# APPENDIX H

In the Supreme Court of Georgia

Decided: April 8, 1981

37047. MICKLE et al. v. CROSS COUNTRY CORPORATION d/b/a CROSS COUNTRY PLAZA SHOPPING CENTER.

MARSHALL, Justice.

*Judgment affirmed without opinion pursuant to Rule 59.*

*All the Justices concur, except Jordan, C. J., who dissents.*